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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 527.

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

against

RITTER'S CAFE, ET AL.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
Of Counsel.

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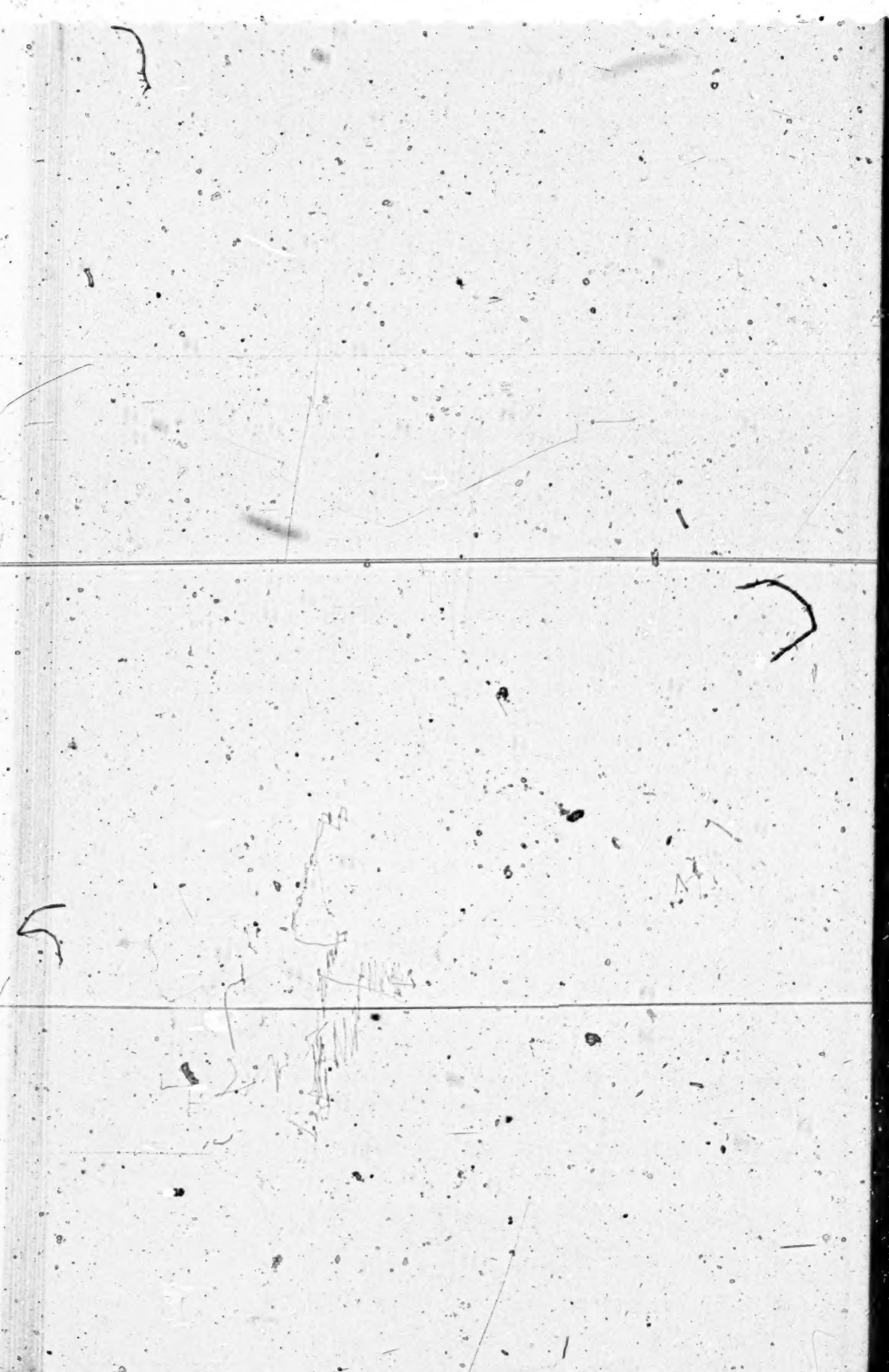

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

The American Civil Liberties Union has for many years been concerned with limitations upon the rights of peaceful picketing which have so often been imposed both by statutes and by judicial decisions, believing that such picketing is one of the forms of freedom of speech and of the press guaranteed by the Constitution. In support of its concern with this subject it has urged the adoption by Congress of legislation which finally resulted in the Norris-LaGuardia Act and has sought to have similar laws enacted by various State legislatures. It also has from time to time filed briefs with this Court dealing with the subject, most particularly in the case of *Carlson* v. *California*,

which involved the constitutionality of a State statute banning all picketing and which, together with *Thornhill* v. *Alabama*, resulted in decisions holding such statutes unconstitutional (310 U. S. 88, 106).

We had supposed that these decisions had set at rest forever the notion that peaceful picketing could be banned because of any State policy which considered it harmful to business interests. It is true that in *Milk Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, a majority of the Court indicated that different considerations might be applicable to injunctions than to statutes. However, in that case the Court was dealing with a situation in which the inference was permissible that past violence had rendered future peaceful picketing impossible. And the decision simultaneously rendered in *American Federation of Labor* v. *Swing*, 312 U. S. 321, indicated that the rule of the *Thornhill* and *Carlson* cases was applicable to injunctions as well as to statutes where no element of fraud or violence was involved. And this rule was announced even though in the *Swing* case the State had sought to sustain the injunction on the ground that its policy with regard to certain types of controversies justified that result.

The decision in the case at bar came, therefore, as a shock and a surprise. While it is evident from the decision simultaneously handed down in the *Wohl* case that this Court will not accept the State Court's view concerning the scope of the labor dispute involved as conclusive, the majority of the Court has, apparently, assumed the burden of deciding in each case whether the State's declaration of policy is sound. We respectfully suggest that this Court pause carefully before embarking on so difficult and troublesome a course, particularly when the constitutional requirements of the situation should make this inquiry irrelevant.

We submit that there are only two considerations which can ever justify restriction of speech and that neither of these is here present. The first relates to the content of the matter spoken or written, the second, to the accompanying circumstances. Here there can be no complaint concerning what was said. For any misstatement which originally was made in the placards (see R. 17) was corrected before the trial (R. 18) and the State Court did not rest its decision in any way upon the content of the placards (see R. 29, 31, 40). So the issue can be only that of the circumstances of the picketing.

And the only complaint with regard to these circumstances was that the picketing union had no dispute with plaintiff in his capacity as owner and operator of the restaurant at which the picketing took place. There was no finding of violence or threats of violence, there was no finding of any interference with traffic or with any of the rights of the public (R. 16-19). On the contrary, there was an express finding "that no violence attended the said picketing of plaintiff's cafe" (R. 19).

It was, therefore, only because of the relationship between the two parties, or lack of it, that the State Court condemned the picketing as "illegal" and "for an unlawful purpose" (R. 19). On that score many State courts have banned peaceful picketing in a great variety of circumstances. See Frankfurter and Green, The Labor Injunction (pp. 242 and following); Teller, Labor Disputes and Collective Bargaining, §123; Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale Law Journal 341; Galenson and Spector, The New York Labor Injunction Statute and the Courts, 42 Col. L. Rev. 51; Fraenkel, Judicial Interpretation of Labor Laws, 6 Univ. of Chic. L. R. 577, 6 I. J. A. Bull. 83.

Thus activities by labor unions have been declared illegal because engaged in to compel the use of live musicians instead of "canned music" (*Opera-on-Tour, Inc.* v. *Weber*,

285 N. Y. 348, cert. den. 314 U. S. ——), to endeavor to get persons to join a union (*Safeway Stores* v. *Retail Clerks Union*, 184 Wash. 322), to compel a closed shop (*Simon* v. *Schwachman*, 301 Mass. 573), to compel the employment of union help by someone who employs no help at all (*Thompson* v. *Boekhout*, 273 N. Y. 390). Injunctions have been granted banning picketing of the advertisers in a newspaper (*B. Gertz, Inc.* v. *Randau*, 162 N. Y. Misc. 786—but see *Davega* v. *Randau*, 166 N. Y. Misc. 246), against picketing a restaurant whose products were delivered in trucks operated by non-union drivers (*Chapman* v. *Doe*, 255 App. Div. 893), against picketing by rival unions (see *Canepa* v. *Doe*, 277 N. Y. 52; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226).

The uncertainty of the considerations properly applicable to cases of this kind is reflected in these and other conflicting decisions noted by Galenson and Spector, supra, at pages 69-71, 74-77. These difficulties this Court will be called upon to resolve in an increasing number of instances if the decision in the case at bar is permitted to stand.

And, if peaceful picketing under the circumstances here disclosed may be enjoined, may the picket also be sent to jail? The opinion on rehearing below suggests that the picketing was in violation of the state anti-trust law (R. 40), which imposes criminal sanctions, Texas, Penal Code, §§1632-1635. And peaceful picketing has been punished as disorderly conduct solely because of the Court's view concerning the economic relation between the parties: *People* v. *Bellows*, 281 N. Y. 67,—but see *People* v. *Muller*, 286 N. Y. 281.

If peaceful picketing can be enjoined, and perhaps punished, because of the Court's view about the labor relationship involved, what about such activities when there is no such relationship at all? Indeed many courts have de-

clared such picketing unlawful (see 8 I. J. A. Bull. 124), as when directed by tenants against a landlord (*People v. Kopczak*, 153 N. Y. Misc. 187, affd. 266 N. Y. 565) or by groups having a political grievance (see 8 I. J. A. Bull. 114).

Moreover, if peaceful dissemination of opinion by means of placards is not protected by the Constitution under these various circumstances would distribution of leaflets be protected? And if not, we have here an opening wedge to the nullification of *Schneider* v. *Irvington*, 308 U. S. 147.

Although not all these variations of the problem appear to have been considered by this Court, the opinion of the majority of this Court seeks to lay down a standard for the resolution of the conflict posed by this experience. But in our judgment it has failed to accomplish this objective. For it speaks in terms of "economic context" and "conscription of neutrals", concepts so vague and uncertain, as the various decisions referred to show, as not to form a suitable basis for any restriction on free speech. Granted that the right to express an opinion may have to yield to considerations of public order, how can considerations of private gain alone be made the criterion? To adopt such a standard would go far to nullify the *Thornhill* and *Carlson* decisions.

We submit that the inquiry upon which the Court has here engaged is wholly at variance with the true meaning which should be given the constitutional guaranty of free speech. As this Court said in the *Bridges* case, 314 U. S. ——, that guaranty is an unequivocal one and "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow."

The difficulties inherent in the problem which the Court has assumed to resolve are made plain in the dissent of Mr. Justice Reed, the objections on broad constitutional grounds in that of Mr. Justice Black. In view of these dissents and the close division within the court and the

far-reaching implications of the majority decision, we respectfully urge the advisability of granting a rehearing in this case so that this Court may further consider the propriety and wisdom of adhering to the decision already rendered.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
Of Counsel.